LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 13 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NUMBER 721

ROLAND J. DUGAS

Petitioner

versus

NIPPON YUSEN KAISHA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

H. ALVA BRUMFIELD
509 St. Louis Street
Baton Rouge, Louisiana
Attorney for Petitioner

JERRY H. BANKSTON
4359 Plank Road
Baton Rouge, Louisiana
Attorney for Petitioner

ORTLIEB PRESS BATON ROUGE

INDEX

Prayer for Writ of Certiorari 1

Opinion Below 2

Jurisdictional Grounds 3

Questions Presented 4

Statutes Involved 5

Statement of the Case 5

Jurisdiction 5

Proceedings 5

Reasons for Granting the Writ 8

Argument 9

Conclusion 12

Certificate of Service 13

APPENDIX

United States Code 28 ..... A1

Judgment of the United States District Court A2

Judgment of United States Court of Appeal for the Fifth Circuit A3

Decision of the United States Court of Appeal for the Fifth Circuit A4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NUMBER _____

ROLAND J. DUGAS

Petitioner

versus

NIPPON YUSEN KAISHA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

Roland J. Dugas prays that a Writ of Certiorari issue from this Honorable Court to review the Judgment of the United States Fifth Circuit Court of Appeals, hereinafter set out in Section A. below.

SECTION: A

OPINION BELOW

ROLAND J. DUGAS

V.

NIPPON YUSEN KAISHA

NO. 23495

UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

JULY 18, 1967

Roland J. Dugas appealed a verdict directed for respondent by the United States District Court for the Eastern District of Louisiana to the United States Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals (although it reversed the District Court's decision in part) entered judgment affirming the directed verdict on May 9, 1967. Roland J. Dugas petitioned for a rehearing which was denied by the Fifth Circuit Court of Appeals on July 18, 1967. The opinion of the Court of Appeals is reported at 378 F.2d 271. No opinion was rendered in connection with the denial of the application for rehearing.

SECTION: B

JURISDICTIONAL GROUNDS,

1.) The Judgment sought to be reviewed is a Judgment of the Fifth Circuit Court of Appeals.

2.) The Petition for Rehearing filed by Roland J. Dugas has been denied.

3.) This Court has jurisdiction to review the Judgment in question by Writ of Certiorari, under the U.S.C.A. 28: 1254 (1).

SECTION: C

QUESTIONS PRESENTED

1.) Is the scope of the doctrine of seaworthiness, extended to a longshoreman injured aboard a vessel lying in navigable waters, limited to defects or vices in the structure of the gear or does the doctrine of seaworthiness extend to the improper arrangement of the gear which causes injury to the longshoreman?

2.) Is there such a doctrine as "operational negligence" that constitutes an exception or limitation upon the warranty of seaworthiness?

3.) If there is a doctrine of "operational negligence" what are the limits of this doctrine upon the warranty of seaworthiness?

4.) Under the facts of the present case, was the concededly improper use of gear, dunnage boards having no steel bands and only one sling, a condition or situation of unseaworthiness or was it operational negligence?

5.) If the improper use of gear is to be classified as only operational negligence should the longshoremen be prejudiced by the doctrine of operational negligence within the area of the Fifth Circuit Court of Appeals whereas in the Third and Fourth Circuits, and probably in the Ninth Circuit no distinction is drawn between operational negligence and unseaworthiness?

6.) What part does the element of time play in unseaworthiness; i. e., how long must a dangerous condition or situation exist before it ceases to be "operational negligence" and becomes an unseaworthy condition?

7.) Is the element of time a part of the doctrine of seaworthiness at all, particularly under the decision in Mitchell v. Traveler Racer, Inc., 1960, 362 U. S. 539?

8.) If time is an element in seaworthiness, and there is a doctrine of "operational negligence" that is a limitation to the scope of the warranty of seaworthiness, should not operational negligence be limited to situations where the act of negligence is simultaneous with the occurrence of the injury?

9.) When an act of negligence creates a dangerous condition in the arrangement or use of gear that is antecedent to the occurrence of the injury, is there not present unseaworthiness (rather than operational negligence)?

10.) Is the tort or negligence doctrine of forseeability an element of unseaworthiness?

11.) Must a longshoreman injured aboard a vessel prove that the owner of the vessel knew of the dangerous condition which caused the injury or should have foreseen that the condition would cause injury?

12.) Must a longshoreman prove that the owner of a vessel should have foreseen that fellow longshoremen would use ship's gear improperly in order to recover for injury caused by the unseaworthy condition of the gear?

13.) Must a longshoreman prove "foreseeability" as an element of unseaworthiness within the jurisdiction of the

Fifth Circuit Court of Appeals whereas he need not prove "foreseeability" within the areas comprised by the other courts of appeal?

14.) If foreseeability is an element of proof of unseaworthiness, wasn't the misarrangement of the dunnage load in the present case a foreseeable action since this type of dangerous arrangement occurs so frequently that the Safety and Health Regulations for Longshoring, issued by the Secretary of Labor on April 25, 1960, under Section 9.81 prohibit the dangerous arrangement?

15.) In view of the frequency of the dangerous arrangement of dunnage loads with no steel bands and a single sling, and in view of the violation of the safety regulation, was not such violation a "foreseeable event" rather than an "isolated and completely unforeseeable event"?

SECTION: D

STATUTES INVOLVED

28 U.S.C.A. 1333 (1); 28 U.S.C.A. 1254

STATEMENT OF THE CASE

1. - Jurisdiction

Jurisdiction was vested in the United States District Court for the Eastern District of Louisiana under the provisions of 28 U.S. Code 1333 (1).

2. - Proceedings

There has never been any dispute as to the facts of the present case. The statement of the case by the United States

Court of Appeals for the Fifth Circuit tracks appellant's brief and sets forth the facts.

This action was by a longshoreman against a shipowner to recover for personal injuries allegedly caused by an unseaworthy condition of the ship. The district court directed a verdict for the defendant, and from the ensuing judgment this appeal is prosecuted. There is no substantial dispute about the facts.

The longshoreman Dugas was employed by Rogers Terminal and Shipping Corporation at the Port of Greater Baton Rouge, Louisiana. The Japanese Steamship Company, generally called the NYK Line, was the owner of the "Asama Maru" which was to be loaded with a cargo of metal drums or barrels containing tetraethyl lead. The accident occurred at about 1 o'clock P.M. on October 25, 1963. Before loading the cargo, dunnage boards were to be loaded and arranged on the decks to provide a resting place for the drums or barrels. The ship was riding low in the water so that there was a distance of some 30 to 45 feet from the floor of the dock to the deck of the ship. The dunnage boards were to be lowered from the dock onto the ship's deck by means of a gantry crane located on the dock. When the boards were lowered to the ship they fell from the sling and injured Dugas on the deck.

The reason why the load tilted and the boards slid and fell on the longshoreman is because it was not sufficiently held in the bundle of dunnage. There were no steel bands, the bands having previously been broken, and were missing. When the load was raised, the single sling was not at precisely the center of gravity of the sling. The load tilted because one end was heavier than the other, and tilted to a forty five degree angle. The dunnage of uneven lengths contained some short boards which were not grasped by the single sling. The tilting

of the load caused the boards to slide and fall out of the load. There should have been a double sling to even up and balance the load and grasp the boards at both ends of the load. All the witnesses, the litigants and the Court agreed that as a matter of fact the load was not slung properly and a second sling should have been used. The absence of the double sling with no bands was the proximate cause of the boards falling, and the absence of the second sling created an inadequate and defective load. This was not a safe loading procedure.

The District Court granted a directed verdict for the steamship company on two theories. First, the District Court held that the shore based gantry crane, sling and load of dunnage boards were not appliances appurtenant to the ship and therefore any accident resulting from their use would not constitute evidence of the unseaworthiness of the ship. The Fifth Circuit Court of Appeals followed the decisions of the other circuits and its own previous decision in Deffes v. Federal Barge Lines, Inc., 1966, 361 F.2d 422, ruled out this first theory and held that the gantry crane, sling and dunnage were appliances appurtenant to the vessel and could make the vessel unseaworthy.

The District Court had a number of ideas which were combined or entertwined into the theory that the dangerous arrangement of the load of dunnage (which the District Court conceded was dangerous and negligently made up) was negligence on the part of fellow longshoremen, i. e., "operational negligence" but not unseaworthiness. Appellant filed an appeal to the United States District Court for the Fifth Circuit.

The Fifth Circuit Court of Appeal pointed out that the Third and Fourth Circuit Courts of Appeal did not make a distinction between operational negligence and unseaworthiness and that the Second Circuit has found extreme difficulty in making any distinction. The Fifth Circuit said that it was

committed to a weak sort of distinction, as contrasted with the other circuits.

However, while the Fifth Circuit Court of Appeals affirmed the decision of the District Court, it did so on the basis not of operational negligence but of a lack of "foreseeability" of the accident. A rehearing was applied for and denied by the Fifth Circuit on July 18, 1967.

REASONS FOR GRANTING THE WRIT

The primary reason for granting a writ of certiorari is that the Court of Appeals herein has rendered a decision in conflict with the decisions of other courts of appeal in the same matter. *The United States Fifth Circuit Court of Appeals admitted the conflict* on pages 6 and 7 of its original opinion:

> "The appellant relies on the leading case of *Grillea v. United States*, 2 Cir. 1956, 232 F. 2d 919, and on a number of other cases. In Grillea the wrong hatch cover was placed over a dad-eye a short time before a longshoreman stepped on it and it gave way beneath him. Judge Learned Hand, with Judge Frank concurring and Judge Swan dissenting, held this to constitute a condition of unseaworthiness. In a long line of subsequent cases reviewed in *Radovich v. Kinnard SS Company*, 2 Cir. 1966, 364 F. 2d 149, the Second Circuit has found extreme difficulty in drawing the line between operational negligence and an unseaworthy condition. Radovich points out, footnote 4, 364 F. 2d 151, that the Third Circuit and the Fourth Circuit have refused to accept any distinction between operational negligence and unseaworthiness. See *Ferrante v. Swedish American Lines*, 3 Cir. 1964, 331 F. 2d 571; *Scott v. Isbrandtsen Co.*, 4 Cir. 1964, 327 F. 2d 113. Ferrante v. Swedish American Lines, supra, is probably the closest case in support of the appellant's position. It was there held that the stevedore's negligent method of assembling piles of ply-

wood boards side-by-side to make a sling load made the ship unseaworthy, even though the ropes used were adequate. The ship was held liable for resulting injuries to longshoremen.

"This Fifth Circuit, however, is committed to a doctrine '*** that a shipowner is not liable for the negligence of longshoremen acting as servants or employees or an independent stevedoring contractor, unless such negligence creates an unseaworthy condition.' *Neal v. Lykes Bros. Steamship Co.*,' 5 Cir. 1962, 306 F. 2d 313, 315. See also, *McQuiston v. Freighters and Tankers Steamship Co.*, 5 Cir. 1964, 327 F. 2d 746."

Petitioner most earnestly urges this court to recognize that the Fifth Circuit Court of Appeals pointed out the conflict and seems to have invited this Court to resolve the conflict among the circuits.

A second reason for granting the writ is that the operational negligence doctrine itself has never been sanctioned by this Court and the decision below has decided a federal admiralty or maritime question in conflict with many decisions of this court which have broadened the protection of the warranty of seaworthiness.

A third reason for granting the writ is that the broad use of "foreseeability" as an element of unseaworthiness conflicts with decisions of this Court which have struck down any such negligence or tort concept (with the exception of *Morales v. City of Galveston*, 1962, 370 U.S. 165).

SECTION: F

ARGUMENT

Petitioner submits that the first error of the Fifth Circuit Court of Appeals was to recognize any distinction be-

tween operational negligence and unseaworthiness. This Court has never intimated that there is any distinction. The Third Circuit Court of Appeals has rejected any distinction, *Ferrante v. Swedish American Lines*, 3 Cir. (1965), 344 F. 2d 204 (1965). The Third Circuit said that the Supreme Court has repeatedly rejected efforts to distinguish or limit the broad range of protected afforded under the seaworthiness doctrine. The doctrine of operational negligence has now acted as a severe restriction upon the seaworthiness doctrine. Petitioner earnestly prays that this Court now reject this restriction which has been perpetuated within the Fifth Circuit.

The Fourth Circuit Court of Appeals has also rejected operational negligence as a limitation upon seaworthiness, saying that in the Fourth Circuit it is no longer open to questions that evidence of the negligence of the longshoremen themselves and their method of operation may present a factual issue as to whether an unseaworthy condition has been created, *Scott v. Isbrandtsen*, 4 Cir. (1964), 327 F. 2d 113.

The Ninth Circuit Court of Appeals has virtually rejected operational negligence as a restriction upon the seaworthiness doctrine *Blassingill v. Waterman Steamship Corporation*, 9 Cir. (1964) 336 F. 2d 367 wherein the negligence of the longshoremen which constitutes a DANGEROUS METHOD OR COURSE OF CONDUCT in loading or unloading a ship may make the ship unseaworthy. If operational negligence is recognized in the Ninth Circuit, it is restricted to instances where the act of negligence occurs simultaneously with the injury. Where the act of negligence terminates leaving a dangerous condition antecedent to the occurrence of the accident and injury, there is an unseaworthy condition, *Beeler v. Alaska Aggregate Corp.*, 9 Cir., 336 F. 2d 108 (1964). In the Second Circuit Court of Appeals, some panels have adopted opera-

tional negligence while others have not, resulting in much confusion, as noted in *Radovich v. Kinnard SS Company*, 2 Cir. 1966, 364 F. 2d 149. Circuit Judge Marshall in *Reid v. Quebec Paper Sales & Transportation Company*, 2 Cir., 1965, 340 F. 2d 34 outlined the conflicting history of "operational negligence". He pointed out that every act of negligence, no matter how short-lived, creates an unsafe condition for the longshoremen exposed to it. Judge Marshall pointed out that operational negligence, also called the Grillea doctrine might well become the Trojan Horse of the warranty of seaworthiness.

It has come to become for longshoremen who are injured in the waters of the Fifth Circuit — they are barred from recovery for injuries by operational negligence while their fellow longshoremen in the Third and Fourth Circuits, and probably in the Ninth and Second Circuits are not so barred.

Petitioner prays that this Honorable Court grant a writ of certiorari to resolve the conflict among the circuits (and among panels of the Fifth Circuit, as in *Marshall v. Ove Skou Rekin A/S et al*, 5 Cir., 1967, 378 F. 2d 193) and relieve petitioner from the disability of operating negligence.

Petitioner seeks certiorari also to resolve a conflict among all the other Circuit Courts and the Fifth Circuit whereby longshoremen must prove that the injurious act of negligence was one that the shipowner could or should have foreseen. No such proof has ever been required in the other Circuits. No such proof has ever been required by this Court with the apparent exception of *Morales v. City of Galveston* wherein the language of "foreseeable event" was seized upon by the Fifth Circuit.

Petitioner contends that this language and decision is in conflict with every other decision of this Court. This Court

has said that the employer has a duty to furnish the employee with safe appliances and a safe place to work, *Mahnich v. Southern S.S. Co.*, 321 U. S. 96, 645 C.t. 455, 88L. Ed. 561. This Court has not, with the possible exception of Morales, held that the shipowner either knew or should have anticipated that the longshoremen would use equipment in a negligent manner. This Court has declared the warranty of seaworthiness to be absolute, although the shipowner did not know of a danger or have reason to anticipate the longshoremen would negligently create a dangerous condition, *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 540, 80 S. Ct. 926. In the Mitchell case Justice Stewart said that the duty to furnish a seaworthy ship is absolute and is completely independent of any duty to exercise reasonable care (a tort or negligence doctrine embodying "foreseeability"). This Court said there is a complete divorcement of unseaworthiness liability from concepts of negligence. Thus a requirement that a longshoreman bear the burden as in a negligence case of proving forseeability is not part of the doctrine of seaworthiness. The decision by the Fifth Circuit below is contrary to this court's decision, particularly the Mahnich and Mitchell cases.

CONCLUSION

Because of the conflict between the decision of the Fifth Circuit Court of Appeals and decisions of other Courts of Appeals, between decision of this Court, and even between decisions within the Fifth Circuit itself. Petitioner earnestly requests this Honorable Court to grant a Writ of Certiorari, and in due course the decisions of the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit be reversed, that petitioner's prayer for summary judgment be granted and this case demanded for trial on the question of damages owed to petitioner.

CERTIFICATE OF SERVICE

We, the undersigned, JERRY H. BANKSTON and H. ALVA BRUMFIELD, Counsel for Petitioners, certify that a true copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana has been mailed, postage pre-paid to: Mr. Tom Phillips, Taylor, Porter, Brooks, Fuller & Phillips, Attorneys at Law, Louisiana National Bank Building, Baton Rouge, Louisiana, attorneys for Nippon Yusen Kaisha, in accordance with the rules of this Court.

This _____ day of October, 1967.

JERRY H. BANKSTON
4359 Plank Road
Baton Rouge, Louisiana

H. ALVA BRUMFIELD
509 St. Louis Street
Baton Rouge, Louisiana

APPENDIX

United States Code: 28

§ 1333

The district Courts shall have original jurisdiction, exclusive of the Courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

§ 1234

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . . . .

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

ROLAND J. DUGAS

versus CIVIL ACTION

NIPPON YUSEN KAISHA No. 3069

JUDGMENT

This cause came on for trial before the Court and a jury, Honorable E. Gordon West, District Judge, presiding, and the Court having directed the jury to find for the defendant at the close of plaintiff's evidence.

IT IS ORDERED AND ADJUDGED that the plaintiff, Roland J. Dugas, take nothing, that the action be dismissed on the merits, and that defendant, Nippon Yusen Kaisha, recover of the plaintiff its costs of action.

Baton Rouge, Louisiana, November 16, 1965.

A. DALLAM O'BRIEN, JR., CLERK

By _____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23495

D. C. Docket No. CA 3069

ROLAND J. DUGAS,

Appellant,

versus

NIPPON YUSEN KAISHA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RIVES and WISDOM, Circuit Judges, and CONNALLY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 9, 1967

Issued as Mandate: July 26, 1967

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23495

ROLAND J. DUGAS,

Appellant,

versus

NIPPON YUSEN KAISHA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(May 9, 1967.)

Before RIVES and WISDOM, Circuit Judges, and CONNALLY, District Judge.

RIVES, Circuit Judge: This action was by a longshoreman against a shipowner to recover for personal injuries allegedly caused by an unseaworthy condition of the ship. The district court directed a verdict for the defendant, and from the ensuing judgment this appeal is prosecuted. There is no substantial dispute about the facts.

The longshoreman Dugas was employed by Rogers Terminal and Shipping Corporation at the Port of Greater Baton

Rouge, Louisiana. The Japanese Steamship Company, generally called the NYK Line, was the owner of the "Asama Maru" which was to be loaded with a cargo of metal drums or barrels containing tetraethyl lead. The accident occurred at about 1 o'clock P.M. on October 25, 1963. Before loading the cargo, dunnage boards were to be loaded and arranged on the decks to provide a resting place for the drums or barrels. The ship was riding low in the water so that there was a distance of some 30 to 45 feet from the floor of the dock to the deck of the ship. The dunnage boards were to be lowered from the dock onto the ship's deck by means of a gantry crane located on the dock.

The dunnage boards arrived at the dock in large bundles of rough lumber. The bundles are usually kept together by two metal bands or straps encircling the lumber. The boards are of varying dimensions.

Dugas and four other longshoremen went aboard the ship and stood next to the inshore rail to await the arrival of the dunnage boards. Four longshoremen went to the offshore side of the ship.

On the dock a longshoreman moved a load of dunnage to the edge of the dock. Another longshoreman on the dock acting as "hook up" man used a metal sling which he passed under and around the load of dunnage and hooked the end of the sling called the cat-eye onto a large hook at the bottom of a line attached to the gantry crane. The crane then lowered without incident the first load of dunnage to the offshore side of the ship. A second load of dunnage was moved into position at the extreme river edge of the dock for attachment to the sling. This second load of dunnage was not a full load

and did not have a metal band or strip around it. Boards were missing from this second bundle which had been removed previously in work on other cranes. There is no dispute that under Section 9.81 of the Safety and Health Regulations for Longshoring, issued by the Secretary of Labor on April 25, 1960, and published in the Federal Register, it was required that double slings be used on unstrapped dunnage.[1] There should have been a double sling to even up and balance the load and grasp the boards at both ends of the load. Nonetheless, the hook-up man placed a single sling in the middle of the load as best he could and, having completed the hookup, walked away and the crane started to lift the load. An interval of some 10 to 15 seconds elapsed between the time the single sling encircling the load was hooked to the hook on the gantry line and the time the crane started raising the load.

When the load was raised it tilted toward the ship and 4 to 6 short boards slid out. The men on the deck of the ship could not see the dunnage on the dock nor could the men on the dock see the men on the ship. The longshoremen on the dock yelled "heads up" and the longshoremen on the inshore side of the ship began running in various directions. One of the boards, some 8 feet long, 1/2 foot wide and 1 inch thick, struck Dugas in the back, painfully injuring and disabling him.

The district court directed a verdict for the defendant on two theories: (1) that the shore-based gantry crane, sling and load of dunnage were not appliances appurtenant to the

1 With an exception not here applicable "* * * except when, due to the size of hatch or deep tank openings, it is impracticable to use them."

ship and any accident resulting from their use would not evidence unseaworthiness of a ship; and (2) that the injuries sustained by Dugas did not result from any unseaworthy condition of the vessel or its appurtenances but from negligence on the part of his fellow longshoremen.

The appellee concedes that since the trial the first ground has been decided by this Circuit adversely to the appellee in *Deffes v. Federal Barge Lines, Inc.*, 1966, 361 F.2d 422, but asks the Court to reappraise that ruling. All of the authorities and reasoning cited by the appellee were considered by this Court in *Deffes* and we adhere to that decision.

The district court was more positive in its opinion of the soundness of the second ground upon which it directed a verdict for the defendant. It seems appropriate to quote a part of the district court's statement of its reasoning to counsel:

> "* * * I am not ready to say that as a fixed settled principle of law that this gear must be actually affixed to the ship; but I am ready to say that in my opinion, in order to find unseaworthiness you must find that the gear itself was unfit for the purposes for which it was intended—not that it's unsafe, because much gear on a vessel is unsafe, and a vessel owner is not obligated to furnish an accident-free ship or accident-free equipment or gear. In this case, every witness testified there was nothing wrong with the crane. I don't think that is part of the ship's gear, but going all the way and assuming that it is, plaintiff's counsel concedes there was nothing wrong with the crane, nothing wrong with the fall of the crane; there was nothing wrong with the hook on the end of the fall of the crane; there was nothing

wrong with the sling that was used, and as a matter of fact, there is not one witness who has testified who has been willing to say that there weren't other slings aavilable to be used had they wanted to use them. No one has testified there was not more than one sling available; they didn't testify there was, but they said they couldn't answer the question, whether there were other slings available; so it hasn't been shown they were not furnished with sufficient slings, but what has been shown is that they were furnished with seaworthy dunnage — because no one has said anything was wrong with the dunnage, the testimony shows up until now, that you can and is not unusual to place bundles of dunnage that are not strapped, in other words partial bundles of dunnage —there is nothing unusual about bringing those aboard a vessel by use of a crane. The testimony is clear on that. So there is no evidence of anything wrong with the dunnage; no evidence of anything wrong with the sling. The only thing wrong is that some longshoreman was negligent in the way the dunnage was — the way the sling was placed on the dunnage, and the negligence continued right down to the moment of the accident, because of the fact that nobody waved, nobody flagged the crane operator; nobody told anyone to get out of the way, they had no way to know. It was purely and simply an operating accident, it seems to me from start to finish.

"Consequently, I believe there is absolutely no material issue of fact whatsoever involved in the case upon which reasonable men could disagree, and therefore, I am forced to deny the motion of the plaintiff for a directed verdict and to grant the motion of the defendant for a directed verdict at end close of plaintiff's case."

The appellant relies on the leading case of *Grillea v.*

United States, 2 Cir. 1956, 232 F.2d 919, and on a number of other cases. In *Grillea* the wrong hatch cover was placed over a pad-eye a short time before a longshoreman stepped on it and it gave way beneath him. Judge Learned Hand, with Judge Frank concurring and Judge Swan dissenting, held this to constitute a condition of unseaworthiness. In a long line of subsequent cases reviewed in *Radovich v. Kinnard SS Company*, 2 Cir. 1966, 364 F.2d 149, the Second Circuit has found extreme difficulty in drawing the line between operational negligence and an unseaworthy condition. *Radovich* points out, footnote 4, 364 F.2d 151, that the Third Circuit and the Fourth Circuit have refused to accept any distinction between operational negligence and unseaworthiness. See *Ferrante v. Swedish American Lines*, 3 Cir. 1964, 331 F.2d 571; *Scott v. Isbrandtsen Co.*, 4 Cir. 1964, 327 F.2d 113. *Ferrante v. Swedish American Lines, supra*, is probably the closest case in support of the appellant's position. It was there held that the stevedore's negligent method of assembling piles of plywood boards side-by-side to make a sling load made the ship unseaworthy, even though the ropes used were adequate. The ship was held liable for resulting injuries to longshoremen.

This Fifth Circuit, however, is committed to a doctrine " * * * that a shipowner is not liable for the negligence of longshoremen acting as servants or employees of an independent stevedoring contractor, unless such negligence creates an unseaworthy condition." *Neal v. Lykes Bros. Steamship Co.*, 5 Cir. 1962, 306 F.2d 313, 315. See also, *McQuiston v. Freighters and Tankers Steamship Co.*, 5 Cir. 1964, 327 F.2d 746. The appellant emphasizes the concluding clause, "unless such negligence creates an unseaworthy condition," and insists that the negligence of the hook-up man had created an

unseaworthy condition at least during the 10 to 15 seconds which elapsed between the time the single sling encircling the load was hooked to the hook on the gantry line and the time the crane started raising the load. We doubt whether that is true. So long as the load stayed at rest on the dock there was no unsafe condition. It was only after the crane started raising the load that it became dangerous and then there was only a momentary interval of time before the dunnage board fell and struck Dugas in the back.

Assuming, however, that an unsafe condition had been created for the 10 to 15 seconds, we think the teaching of *Morales v. City of Galveston*, 1962, 370 U.S. 165, is fatal to appellant's contention. The first decision of this Court in that case, reported in 275 F.2d 191, had been vacated and the case remanded to this Court for consideration in the light of *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539. See *Morales v. City of Galveston*, 1960, 364 U.S. 295. Upon remand, Judge Hutcheson with Judge Jones concurring was of the view that *Mitchell* was inapplicable to the facts of the *Morales* case, and again affirmed the district court's judgment, 291 F.2d 97. The writer dissented on the ground that "the introduction of the fumigated grain rendered the ship temporarily unseaworthy, that is, long enough to injure the libelants," and took a position similar to that now advocated by appellant, saying:

> "In the present case the district court found:
>
> 'A last "shot" of grain was called for, and was released into the bin. This quantity of grain completely covered the hatch opening (which was the only means of entrance and exit for the longshore-

men, and was the only source of ventilation); hence, the longshoremen were working for the moment in an area completely enclosed and without access to outside air.'

"It is clear that temporarily the bin where the libelants were working was not a reasonably safe place in which to work."

291 F.2d at 99. The Supreme Court again granted certiorari, but affirmed the judgment, holding that "what caused injury in the present case, however, was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable introduction of a noxious agent from without." 370 U.S. 171. Mr. Justice Douglas, with whom The Chief Justice and Mr. Justice Black concurred, dissented, but even they in dissenting conceded that, "If this were an isolated instance of fumigated grain releasing noxious gases, no claim of unseaworthiness could be maintained." 370 U.S. 171. Mr. Justice Douglas further stated:

"But I agree with Judge Rives of the Court of Appeals that the vessel and her appurtenances were not 'reasonably fit for their intended use' (291 F.2d 97, 99), where up to 10% of the grain loaded from this elevator was fumigated and where the owners had knowledge of like accidents." 370 U.S. 172.

Morales thus emphasizes the element of "intended use" of foreseeability as to the "reasonable fitness" part of the concept of unseaworthiness. That is true also of *Mitchell v. Trawler Racer, Inc., supra*, where the Court said:

"The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for

> their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336."

362 U.S. at 550.

There was no evidence in the present case that the shipowner could anticipate an intended use of the single sling without a second sling in violation of the Safety and Health Regulations of the United States Department of Labor, to which we have heretofore referred. The appellant himself insists that "the violation of this safety regulation caused the accident." (Appellant's Brief, p. 6.) That violation was the negligent act of the hook-up man, a fellow longshoreman of Dugas. The accident occurred as soon as that violation created a dangerous condition. The shipowner was under no duty to guard against that "isolated and completely unforeseeable" event, nor did that event prove the vessel not to be "reasonably fit for her intended service."[2]

The judgment is therefore AFFIRMED.

---

2 Since the writing of this opinion two other cases have been decided by this Court which bear upon the difference between operational negligence and unseaworthiness and which seem to us to be consistent with this opinion. Antoine v. Lake Charles Stevedores, Inc., et al., No. 23400, and Robichaux v. Kerr McGee Oil Industries, Inc., No. 23273, both decided April 13, 1967, ms.